89- 1682

No. _____

Supreme Court, U.S.
FILED
APR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

ALAN J. STALHEIM, M.D.,

Petitioner,

vs.

ALBERT LEA MEDICAL SURGICAL CENTER, LTD., et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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75 pp

QUESTIONS PRESENTED

1. Whether the federal district court exceeded its legal authority by dismissing Petitioner's lawsuit, with prejudice, after counsel for the parties made oral representations that the case had settled, did not state that dismissal with prejudice was an agreed term; and there being no compliance with Fed. Rule Civ. P. 41.

2. Whether parties who have settled their federal civil litigation and wish to dismiss their respective causes, are required to strictly comply with Fed. Rule Civ. P. 41 to have the case removed from the trial docket.

3. Whether settlement agreements of parties involved in civil litigation before the federal bench are solely a matter of private contract between the parties, enforceable only by parties; or whether the federal district courts possess inherent jurisdiction to intervene by conducting evidentiary hearings on settlement terms, authority of attorneys to bind clients, or make findings of fact without an evidentiary hearing, and ultimately enforce the terms of settlement.

LIST OF PARTIES

PETITIONER:

ALAN J. STALHEIM, M.D.

RESPONDENTS:

ALBERT LEA MEDICAL SURGICAL CENTER, LTD.; ALBERT LEA REGIONAL MEDICAL GROUP, P.A.; LOWELL WHERRY BARR, M.D.; ARLO ROSLYN BLUMER, M.D.; JAMES FOY BURNS, M.D.; DENNIS A. COLBY, D.O.; TERRY LEE MARTINSON, M.D.; RICHARD SHEPARD, M.D.; THOMAS ANDREW TREANOR, M.D.; C.C. LOWERY; DAVID L. VAN FOSSEN; NAEVE HOSPITAL; LARRY W. PFAFF; L.E. SHELHAMER, M.D; DANIEL J. McCORMICK; NAEVE HEALTH CARE ASSOCIATION; JOHN DOE, MARY ROE; and XYZ CORPORATION.

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The opinion of the Court of Appeals for the Eighth Circuit dated January 31, 1990 is unpublished and reprinted in the Appendix hereto, p. 36a, *infra*.

The Orders of the United States District Court, District of Minnesota, Third Division, dated February 17, 1989, and October 7, 1988 are reprinted in the Appendix hereto, pp. 14a and 12a, *infra*; respectfully.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. 1983, 42 U.S.C. 1985, 28 U.S.C. 1331, 28 U.S.C. 1332, 28 U.S.C. 1343, and 28 U.S.C. 1291. Dr. Alan J. Stalheim, Petitioner, brought this suit in the United States District Court, District of Minnesota, Third Division. On October 7, 1988, the District Court Judge ordered Dr. Stalheim's suit dismissed with prejudice. See p. 12a, *infra*. On February 17, 1989, Dr. Stalheim's Motion to Reopen was denied, the district court made several findings of fact and the "settlement check" was ordered deposited with the Clerk of the U.S. District Court. See p. 14a, *infra*. On appeal from the United States District Court for the District of Minnesota, pursuant to 28 U.S.C. 1291, the Eighth Circuit Court of Appeals on January 31, 1990 affirmed the judgment of the district court. See p. 36a, *infra*.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. Section 1254(1). See p. 43a, *infra*.

STATUTE INVOLVED

This case involves the interpretation or application of Federal Rule of Civil Procedure 41, 28 U.S.C.

Fed. R. Civ. P. 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.
(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

STATEMENT OF THE CASE

On June 20, 1986, Dr. Alan J. Stalheim, Petitioner, filed a lawsuit against the Respondents in the U.S. District Court of the District of Minnesota, alleging, among others, breach of employment contract, defamation, fraud and intentional infliction of emotional distress arising out of his professional relationship with Respondents as a licensed practicing surgeon in the State of Minnesota.

As the litigation progressed, settlement discussions ensued. On August 22, 1988, a settlement conference was held between the parties or their representatives before the Honorable Janice M. Symchych, magistrate of said court. The August 22, 1988 conference was not held on the record. Approximately six (6) weeks later, on October 3, 1988, the magistrate ordered another proceeding be held. The October 3, 1988 proceeding was held on-the-record and is one of the major focal points of this case. For the complete eleven (11) page transcript of the October 3, 1988 proceeding before Magistrate Symchych, see Appendix pages 1a through 11a, *infra.*

Although the October 3rd proceeding was on the record, no written notice of the proceeding was provided, and it was apparently convened at the oral request of said magistrate. No notice was given of the nature of the proceeding nor were any parties other than Petitioner present. The Respondent's attorneys were present at the proceeding. No witnesses were sworn, no rules of evidence followed, no written stipulation of dismissal signed by the parties as required by Rule 41 was offered or filed, no mutual releases were offered, no written agreements were offered and there was no discussion of

dismissal of Petitioner's claims with prejudice. Never was there any discussion to turn an alleged settlement agreement into a consent decree or an agreement to seek judicial approval in any fashion. See p. 1a, through p. 11a, *infra*. However, at that October 3, 1988 proceeding, based upon the oral representations of Petitioner's attorney, attorneys for the Respondents, and responses by Petitioner from questions by the magistrate, the magistrate "found" there was a binding oral settlement between the parties as recited by Petitioner's attorney. See p. 9a, *infra*. Petitioner disputes that he gave his attorney authority to settle his claims according to the terms as outlined by his attorney at the October 3, proceeding as evidenced by his affidavit filed in the district court and the Mailgram forwarded to his attorney on September 8, 1988. See p. 21a and 44a, *infra*. Petitioner was never granted an evidentiary hearing at any time on any issue.

Although there was never any compliance with Rule 41, the district court on October 7, 1988, on its own initiative, ordered the dismissal of Petitioner's claims with prejudice, i.e. res judicata effect. See p. 12a, *infra*. It will be demonstrated that such judicial action is not authorized by the Federal Rules of Civil Procedure and such judicial action was clearly in excess of any grant of authority or jurisdiction to the district court. It will be requested that this Court exercise its supervisory power and order the vacation of the district court orders of October 7, 1988 and February 17, 1989 and the sanctioning of them by the Eighth Circuit Court of Appeals.

In regard to the February 17, 1989 order, p. 14a, *infra*, the district court without hearing or oral argument again summarily ordered that Petitioner's motion to reopen the

case pursuant to Rule 60(b) be denied. The court also ordered that the "settlement check" be deposited with the clerk for distribution in accordance with the fee retainer agreement executed between Petitioner and the law firm of Collins, Buckley, Sauntry & Haugh, upon proper petition by the Collins firm and further order of the court. See p. 14a. *infra.*

In support of its summary denial of Petitioner's motion to reopen, the court made various findings of fact, although no evidentiary hearing was held, (a fact that is conceded by the Respondents), and cites the case of *Greater Kansas City Laborers Pension Fund v. Paramount Industries, Inc.*, 829 F.2d 644 (8th Cir. 1987). See p. 17a, *infra.* Also, without anything on the record to support the action, the district court ordered that the "settlement check" be deposited with the clerk. See p. 14a, *infra.* The district court became further involved in the parties' alleged settlement process by contacting Petitioner's subsequently hired attorney, Mr. John C. Hottinger, and the Collins firm in regard to the handling and deposit of the "settlement checks." Please see letter dated May 3, 1989, authored by Chief Judge Donald D. Alsop. See p. 19a, *infra.*

Greater Kansas City Laborers Pension Fund, supra, is factually similar to Petitioner's case, however, although cited by the district court in support of the proposition that an attorney can bind his client to a settlement agreement, the Eighth Circuit on appeal remanded the case back to the district court for an evidentiary hearing on the issue of authority of an attorney to bind a client. The Eighth Circuit stated that the district court had erred in summarily denying the Rule 60(b) motion without any

type of evidentiary hearing on the issue of authority. *Greater Kansas City Laborers Pension Fund*, 829 F.2d at 646. Thus, in the instant case, with regard to Petitioner, the district court, although it made a "finding" that Petitioner's attorneys had the authority to settle the action, it did so without holding any type of evidentiary hearing upon which to base such a finding. This action by the district court was contrary to *Greater Kansas City Laborers Pension Fund, supra*. In an affidavit authored by Petitioner and filed in the district court, Petitioner clearly sets out facts and circumstances disputing that he gave his attorneys authority to settle his claim as outlined by Petitioner's attorney at the October 3, proceeding. See p. 21a, *infra*.

On Petitioner's appeal to the Eighth Circuit Court of Appeals, the Eighth Circuit in its memorandum order stated that the sole issue before the magistrate and the district court was one of fact and not law: "[D]id Dr. Stalheim agree to a settlement?" See p. 39a, *infra*.

In support of its decision denying Petitioner's appeal, the Eighth Circuit cited the case of *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) as authority. See p. 39a, *infra*. The Eighth Circuit concluded that there were no errors of law made by the district court and that the finding of fact as to the existence of a settlement between the parties was not clearly erroneous. See p. 39a, *infra*.

Anderson v. City of Bessemer City, 470 U.S. 564 (1985), involved this Court's clarification of the clearly erroneous standard of review to be applied by the circuit courts in

reviewing district court findings of fact after trial. *Anderson*, 470 U.S. at 568. In *Anderson*, the district court heard a two (2) day trial in a Title VII action, made certain findings of fact as to discrimination; said findings were subsequently reviewed by the Fourth Circuit. This Court held that the Fourth Circuit had misapprehended and misapplied the clearly erroneous standard and reversed the judgment of the Fourth Circuit. *Anderson v. City of Bessemer City*, 470 U.S. at 581. Thus, in Petitioner's case, the Eighth Circuit applied the standard of review used when the district court holds a trial or other evidentiary hearing. Accordingly, since there was not properly a finding of fact by the district court, the application of *Anderson v. City of Bessemer City, supra*, by the Eighth Circuit appears to be without foundation. Petitioner was never offered an evidentiary hearing of any nature.

REASONS FOR GRANTING WRIT

I.

The district court exceeded its legal authority by dismissing Petitioner's claims, with prejudice, after an alleged oral voluntary settlement contract; deprived Petitioner of his unconditional right to a Rule 41(a) dismissal by stipulation and this Court in its supervisory capacity should direct the district court to vacate orders of dismissal with prejudice and the sanctioning thereof by the Eighth Circuit Court of Appeals.

The merits of Petitioner's Writ to this Court can be resolved by the exercise of this Court's supervisory

power over the lower courts. If this Court chooses to require that parties who settle follow the clear and unambiguous language of Federal Rule of Civil Procedure 41(a)(1)(ii) and reject the notion, as was done in *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985), to apply "so formless a concept as inherent power to give the federal courts an indefinite jurisdiction over disputes . . . ," then no further consideration of this Writ is necessary. *McCall-Bey*, 777 F.2d at 1187. As stated previously, the district court dismissed Petitioner's cause with prejudice. Even assuming for argument purposes that a settlement between the parties was reached as outlined by Petitioner's attorney at the October 3, 1988, proceeding, *never* was there a stipulation or term agreed upon which would allow the court to dismiss Petitioner's cause with res judicata effect or allow the court to order the settlement proceeds be deposited with the clerk for distribution according to Petitioner's fee agreement with his attorneys.

The case of *In re Wolf*, 842 F.2d 464 (D.C. Cir. 1988) establishes dispositive principles in relation to this Writ and if approved by this Court, would clearly resolve disputes of law, disputes of procedure and current debate over the extent of district court jurisdiction regarding voluntary settlement of lawsuits.

In *In re Wolf*, the parties actually filed a written stipulation agreeing to a voluntary dismissal of the cause without prejudice. *In re Wolf*, 842 F.2d at 465. The district court then entered an order directing that the action be dismissed with prejudice if neither party moved to reopen the case within thirty (30) days. Prior to the expiration of the thirty (30) day period, plaintiff petitioned the Circuit Court of Appeals for the District of Columbia for

a writ of mandamus directing the district court to vacate its order dismissing plaintiff's cause with prejudice. *In re Wolf*, 842 F.2d at 465. The Circuit Court of Appeals for the District of Columbia directed the district court to vacate its order dismissing the plaintiff's cause with prejudice. *In re Wolf*, 842 F.2d at 466.

Because *In re Wolf* is dispositive in application to Petitioner's Writ, most of the two (2) page opinion will be set out herein as follows:

> An extraordinary Writ such as a Writ of Prohibition or a Writ of Mandamus is appropriate "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or compel it to exercise its authority when it is its duty to do so." [Citations Omitted].

In re Wolf, 842 F.2d at 645.

> Thus, "it is clear that only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." [Citations omitted]. The burden is on the Petitioners to prove that their right to the writ is "clear and indisputable." [Citations omitted].

In re Wolf, 842 F.2d at 464.

> Here, the district court judge "deprived the parties of their unconditional right to a Rule 41 (a)(1)(ii) dismissal by stipulation. [Citations omitted]. By altering the stipulation and causing the dismissal to be with prejudice, the district court judge has imposed legal prejudice on Plaintiffs. "Imposition of such a condition (dismissal with prejudice) directly conflicts with the clear and unambiguous language of Rule 41 (a)(1)(ii) which contains no exceptions that call for the exercise of judicial discretion by any

> court." *Id.* Therefore, due to the district court's excess of its legal authority we granted the petition for writ of mandamus and directed the district court to vacate its order.

In re Wolf, 842 F.2d at 465-66.

The indisputable fact in the history of Petitioner's case is that no record or mention of a dismissal with prejudice was ever made, nor was there ever a request for retention of district court jurisdiction. Moreover, it is also indisputable that no discussion or record was ever made regarding the deposit of the "settlement check" with the clerk for dispersal in accordance with Petitioner's fee agreement with his attorneys nor any discussion of depositing the Respondents' check into interest bearing accounts as suggested by the district court in its letter of May 3, 1989. See p. 19a *infra*. A dismissal with prejudice gives a defendant all the relief to which he is entitled on a plaintiff's claim, that is, not only final determination of the controversy in his favor but also freedom from the possibility that another suit will be brought by plaintiff on the same cause of action. *Sheridan v. Fox*, 531 F. Supp. 151 (E.D. Pa. 1982). Dismissals with prejudice are reserved for only the most egregious of cases where there is a clear record of delay or contumacious conduct by the plaintiff and where lesser sanctions would not serve the interests of justice. *Jones v. Caddo Parish School Board*, 704 F.2d 206, 216 (5th Cir. 1983).

An Eighth Circuit case which also clearly demonstrates that the district court improperly interfered with Petitioner's settlement process is *Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180 (8th Cir. 1984). In *Gardiner* the parties actually executed written settlement agreements

and executed stipulations of dismissal with prejudice. *Gardiner*, 747 F.2d at 1185. The court then on its own initiative entered a "So Ordered" notation on the parties' settlement agreement. The settlement agreement was never filed. The defendant appealed claiming "that the settlement of individual actions is wholly within the power of the parties, that the district court's action apparently converts a private contract into a decree a violation of which would be a contempt of court, and that the district court had no authority to approve or disapprove the Settlement Agreement." *Gardiner*, 747 F.2d at 1183. The Eighth Circuit Court of Appeals agreed and reversed. *Gardiner*, 747 F.2d at 1183. It is also interesting to note that the Eighth Circuit would have considered defendant's appeal as a petition for writ of mandamus. *Gardiner*, 747 F.2d at 1183, footnote 11.

In *Gardiner* the court stated "By entering the notation [So Ordered] on the parties' agreement without their knowledge or consent, the district court, in effect, imposed a material condition on the parties' right to a stipulated dismissal – that the Private Settlement Agreement be approved by court order, enforceable by contempt. Imposition of such a condition directly conflicts with the clear and unambiguous language of Rule 41(a)(1) which contains no exceptions that call for the exercise of judicial discretion by any court. We hold that the district court's notation on the parties' private agreement was improper." *Gardiner*, 747 F.2d at 1190. "Such conduct by the district court constitutes interference in the parties' settlement." *Gardiner*, 747 F.2d at 1189.

Petitioner herein presents facts which even more clearly than *In re Wolf, supra*, and *Gardiner, supra*, stand

for the proposition that the district acted in excess of its jurisdiction or authority. In *In re Wolf, supra,* and *Gardiner, supra,* a written stipulation of dismissal as required by Rule 41 was executed by all parties and filed. No such stipulation as required by Rule 41 was signed by Petitioner or any other party. In *In re Wolf, supra,* and *Gardiner, supra,* there was also presented into evidence actual written and executed settlement agreements. No such written and executed agreement was ever discussed, offered or alleged by Petitioner, Petitioner's attorney or Respondents.

In addition to summarily dismissing Petitioner's cause with prejudice, the district court, after motion to reopen, in its February 17, 1989 order, made eight (8) findings of fact which in their substance found that Petitioner had given his attorney authority to settle, that there was an offer and acceptance of specific terms and that Petitioner confirmed the terms of a settlement. See p. 15a and 16a, *infra*. However, as stated above, there was no evidentiary hearing of any type upon which to make such findings. Said district court order is absent any reference that the findings were based upon any evidence adduced (because there was none) and refers to the only recorded proceeding (October 3, 1988) as a "confirmation" hearing. See p. 15a, *infra*.

In *United States v. Ward Baking Co.*, 376 U.S. 327 (1964), this Court addressed the issue of whether and under what circumstances a district court may properly enter a "consent" judgment in a civil antitrust suit without the consent of the Government and without trial of certain disputed issues. *U.S. v. Ward Baking Co.*, 376 U.S. at 327. After an extensive period of settlement negotiations, the bakery companies filed with the district court a proposed form of judgment with specific terms, which

was subsequently amended. The Government objected to the last proposed judgment on the basis that it failed to include two necessary items of relief. *U.S. v. Ward Baking Co.*, 376 U.S. at 328-29. Despite the objections by the Government, the district court entered the amended "consent" judgment. *U.S. v. Ward Baking Co.*, 376 U.S. at 330. The district court judgment recited that it was entered without trial or adjudication of any of the issues of fact or law and before the taking of testimony and the district court went on to justify its entry of judgment on the basis that the Government did not have a reasonable basis upon which to include additional provisions in the proposed judgment and the proposed judgment which the court entered provided all the relief which the plaintiff would be entitled after entry of a decree pro confesso and after trial. *U.S. v. Ward Baking Co.*, 376 U.S. at 330. This Court concluded the district court erred in entering the "consent" judgment without the Government's actual consent. *U.S. v. Ward Baking Co.* 376 U.S. at 330. In support of its holding this Court set out principles regarding findings and judgments by district courts absent a record. "It would be a rare case where all the facts necessary for a trial court to decide whether a disputed item of relief was warranted could be determined without an opportunity to know the record." *U.S. v. Ward Baking Co.*, 376 U. S. at 330. This Court recognized that a full exploration of facts is usually necessary in order for the district court to properly draw a decree so as to prevent future violations and eradicate existing evils. *U.S. v. Ward Baking Co.*, 376 U.S. at 330-31. Accordingly, this Court vacated the judgment and the case was remanded for trial. *U.S. v. Ward Baking Co.*, 376 U.S. at 335.

U.S. v. Ward Baking Co., supra, is applicable to the facts as presented by Petitioner in so far as it supports the proposition that the district court acted in excess of its legal authority; to include making findings of fact adverse to Petitioner, beneficial to Respondents, and made without a trial, evidentiary hearing, or the benefit to know the record or facts on any of the issues either raised by Petitioner or the Respondents below. Moreover, the Eighth Circuit, as aforescribed, based its review of the district court as if it were reviewing findings of fact by the district court. See p. 39a *infra*. Therefore, since the district court could not have made findings of fact under the circumstances, especially with regard to a dismissal with prejudice, the foundation upon which the Eighth Circuit based its review of the "findings" of the district court is nonexistent. If there was no evidentiary hearing or record of these conditions, there could be no findings of fact.

To summarize, strict adherence by the parties to Rule 41 and the application of *In re Wolf, supra,* and *Gardiner, supra,* make clear what is required of parties if they have legitimately settled their dispute and would constitute conclusive evidence to the court that the parties have settled and the matter dismissed pursuant to the stipulation filed with the clerk. Simple adherence to Rule 41 by parties who have settled their disputes will also work toward preventing abuses by defendants and plaintiffs alike, who seek to interject into the litigation unmeritorious and unsubstantiated oral settlement agreements which by their nature, if disputed, would require a separate trial on its terms and thus only serving to make

often complex and multiparty litigation even more complex and a trap for the unwary or misinformed party. All of the assertions as raised below by Respondents such as "society favors a settlement," that courts have "inherent authority" to enforce a settlement agreement, and that no evidentiary hearing was necessary, will all steadfastly be reasserted by the Respondents in support of the district court's dismissal of Petitioner's cause and the alleged settlement agreement. This is not at all surprising because the district court, on its own accord and in excess of authority, gave Respondents much more than they ever bargained for, hoped to achieve, or paid for.

Respondent would also respectfully contend that all the appeals, motions to reopen, requests for evidentiary hearings, alleged waste of judicial resources and so forth can all be avoided if this Court requires strict compliance with Rule 41 by parties who have legitimately settled their federal court claims and who on their own volition file executed stipulations of dismissal. By ordering the vacating of the October 7, 1988 district court order, and the February 17, 1989 district court order, and the sanctioning of same by the Eighth Circuit, this Court will not only provide authoritative guidance to the district court and parties as to the proper application of Rule 41, but this Court will also fulfill its supervisory role over the excesses of legal authority as described above.

II.

The Federal Courts of Appeals have rendered decisions in direct conflict regarding the nature and extent of district court jurisdiction over private settlement contracts, federal enforceability of same, and the application of Rule 41 to the federal settlement and docketing process, requiring clarification and unification of these important issues by this Court.

The district court dismissed Petitioner's cause with res judicata effect. Petitioner, if the district court order of October 7, 1988 stands, effectively precludes him from bringing any other cause against any of the defendants and gives Respondents all the relief to which they may be entitled on Petitioner's claims. *Sheridan v. Fox*, 531 F. Supp. 151 (E.D. Pa. 1982).

In two Sixth Circuit cases, cited below by Respondents, *Aro Corporation v. Allied Witan Co.*, 541 F.2d 1368 (6th Cir. 1975) and *Kulka v. National Distillers Products Co.*, 483 F.2d 619 (6th Cir. 1973), the respective courts discuss the inherent jurisdiction or authority of the court to summarily enforce settlement agreements and in *Aro Corporation, supra,* to assume and retain jurisdiction over settlement agreements.

In *Kulka, supra,* it was noted that the district court's authority for entry of final judgment incorporating the terms of a pre-trial settlement agreement rests under neither Rule 56 nor Rule 16, but rather such a judgment is in the nature of a judgment by consent authorized under what has been consistently recognized as the trial court's inherent power to summarily enforce settlement agreements entered into by the litigants. *Kulka*, 483 F.2d at 621. *Kulka*, asserts that the power of a trial court to enter a

judgment enforcing a settlement agreement has its basis in the policy favoring the settlement of disputes and the avoidance of costly and time-consuming litigation. To effectuate this policy, the power of a trial court to enforce a settlement agreement has been upheld even where the agreement has not been arrived at in the presence of a court nor reduced to writing. *Kulka*, 483 F.2d at 621. However, the court in *Kulka, supra*, recognized that inequities in certain cases may result from summary enforcement of alleged settlement agreements.

> While summary enforcement of a settlement agreement may very well promote the above policy in cases where there exists no substantial dispute as to the entry into, or terms of, the agreement, summary enforcement may result in inequities, when – as here – such a dispute does exist.

Kulka, 483 F.2d at 621.

Surprisingly, *Kulka, supra*, is factually very similar to those facts as presented by Petitioner. In *Kulka* the judgment was entered upon, and incorporated the terms of a pre-trial settlement which the district court found to have been agreed to by all parties. Despite its attorney's representations to the contrary, the intervenor-appellant, Liberty Mutual, asserted that it had never agreed to the terms of the settlement as adopted by the court. *Kulka*, 483 F2d. at 620. The district court relied upon the unsworn statements of counsel, including counsel for Liberty Mutual, and affidavits in summarily resolving the dispute respecting the terms of the alleged agreement. *Kulka*, 483 F.2d at 622. Liberty Mutual filed an affidavit asserting that it did not give its attorney authority to settle as outlined in court by its attorney. *Kulka*, 483 F.2d

at 620, 622. The Sixth Circuit held that despite the statements by counsel as to terms of the settlement, the affidavit filed by Liberty Mutual, if true, would preclude enforcement of the purported agreement. *Kulka*, 483 F.2d at 622. The Sixth Circuit concluded that the district court erred in failing to conduct an evidentiary hearing which would have at least afforded an opportunity for the district court to properly judge the credibility of the affiant and an opportunity for their cross-examination. Accordingly, the district court judgment was vacated and the case remanded for an evidentiary hearing on the disputed terms of the purported settlement agreement. *Kulka*, 483 F.2d at 622. Thus, where no Rule 41 compliance was accomplished by the parties, the district court in *Kulka* was required to become involved in the settlement of the parties to first determine if there is a "substantial dispute" regarding terms of an agreement and if so, then to conduct an evidentiary hearing on same.

The other Sixth Circuit case discussing inherent authority of courts in respect to settlements and the extent of authority to enforce same after dismissal by the parties is that of *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368 (6th Cir. 1976). In *Aro Corp., supra*, the plaintiff filed suit alleging patent infringement and defendant counterclaimed seeking declaratory judgment of non-infringement. The parties engaged in protracted negotiations, involving exchange of seven license drafts. They then agreed to stipulate dismissal of the action and executed a written license agreement. *Aro Corp.*, 531 F.2d at 1370. Shortly thereafter Allied refused payment under the agreement and Aro filed under Rule 60 a motion to vacate the order dismissing the suit and a request for specific

performance of the settlement agreement, which was granted by the district court. *Aro Corp.*, 531 F.2d at 1370. In discussing inherent power or jurisdiction of the district court, the Sixth Circuit stated that is well established that courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them, citing, among others, *Kulka v. National Distillers Products Co.*, 483 F.2d 619 (6th Cir. 1973). "Even in those instances in which the court's original jurisdiction may have been questionable, it has jurisdiction over settlement agreements, the execution of which renders the prior controversy academic." *Aro Corp.*, 531 F.2d at 1371.

The Sixth Circuit then went on to distinguish *Kulka, supra,* from the case at bar in that the "[s]ummary enforcement of the settlement herein was determinable solely as a matter of law." *Aro Corp.*, 531 F.2d at 1372. Accordingly, the order of the district court was affirmed. *Aro Corp.*, 531 F.2d at 1374. Thus, in *Aro Corp.* the district court was involved in the parties' settlement to the extent of retaining jurisdiction over and enforcing the settlement of the parties.

In cases where courts discuss their inherent authority or jurisdiction to find and indefinitely enforce settlement agreements, certain abuses and limitations are recognized. The inherent powers doctrine as stated in *Aro Corp, supra,* has no limit in time or application. It is submitted by Petitioner that such case by case delimitation or expansion of the district court's inherent authority in respect to litigants' settlement agreements, exposes parties to enormous uncertainty and subjectivity as to the true limits of federal court authority. There is, in light of cases such as *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir.

1985), *U.S. v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *U.S. v. City of Miami*, 664 F.2d 435 (5th Cir. 1981), and others, discussed below, a significant need for this Court to clarify and unify the role and extent of authority of federal courts in the settlement process.

The Seventh Circuit in *McCall-Bey, supra*, stated as follows in regard to *Aro, supra*.

> We thus reject the view taken by the Sixth Circuit in *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368 (6th Cir. 1976), that federal courts have inherent power to enforce settlements of litigants before them in favor of the contrary view of the Fourth Circuit in *Fairfax Country-Wide Citizens Ass'n v. County of Fairfax, supra*. Speaking with great respect, we think the Sixth Circuit in *Aro* confused the power of the district judge under Rule 60(b) to restore a previously dismissed case to his docket, which he undoubtedly has, with his power to adjudicate a breach of contract, which he may not have – and certainly does not have by virtue of Rule 60(b).

McCall-Bey, 777 F.2d at 1186. With regard to dismissals of settled lawsuits the Seventh Circuit stated, "[n]either the language nor history of the rule [Rule 41] suggest that it empowers the judge to order specific performance of the parties' undertakings in the settlement agreement. As we have said, Rule 41(a)(2) is *not* invoked when there is a settlement; as dismissal pursuant to settlement normally is made under Rule 41(a)(1)(ii), which is to say without any court action at all." *McCall-Bey*, 777 F.2d at 1184 (emphasis supplied). The Seventh Circuit further noted that Rule 41(a)(1)(ii) requires that the stipulation be filed in court, and the date of filing is the date the dismissal takes effect. The requirement that the stipulation be filed

in court is not merely a technicality. It provides a permanent record that facilitates the application of the doctrine of res judicata to subsequent related litigation in those cases where the stipulation recites that dismissal is with prejudice, and it provides information essential to the management of a judicial docket. *McCall-Bey*, 777 F.2d at 1185.

Another important case that both supports Petitioner's request herein and also holds contrary to the cases of *Aro Corp., supra*, and *Kulka, supra*, in relation to parties' settlement procedures is *U.S. v. City of Miami*, 614 F.2d 1332 (5th Cir. 1980). The Fifth Circuit stated that it was required to explore in some detail the roles and responsibilities of the parties to the lawsuit, the district judge, and the appellate court in the consent decree context. *U.S. v. City of Miami*, 614 F.2d at 1326. The Fifth Circuit in regard to private lawsuits enumerated the following principle:

> In what can be termed "ordinary litigation," that is, lawsuits brought by one private party against another private party that will not affect the rights of any other persons, settlement of the dispute is solely in the hands of the parties. If the parties agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved. *U.S. v. City of Miami*, 614 F.2d at 1330.

The Fifth Circuit went on to state that procedurally it would seem to be impossible for the judge to become involved in overseeing a settlement, because the parties are free at any time to agree to a resolution of the dispute by private contractual agreement, and to dismiss the lawsuit by stipulation. In this situation then the trial court

plays no role in overseeing or approving any settlement proposals. *U.S. v. City of Miami*, 614 F.2d at 1330.

In its companion case of *U.S. v. City of Miami*, 664 F.2d 435 (5th Cir. 1981), the Fifth Circuit set out principles regarding subsequent enforcement of private settlement agreement. "The parties to litigation may by compromise and settlement not only save the time, expense, and psychological toll but also avert the inevitable risk of litigation. [Citations omitted]. If the parties agree to compose [sic] their differences by a settlement agreement, however, the only penalty for failure to abide by the agreement is another suit. Litigants, therefore, have sought to reinforce their compromise and to obtain its more ready enforceability by incorporating it into a proposed consent decree and seeking to have the court enter this decree." *U.S. v. City of Miami*, 664 F.2d at 439.

The Fifth Circuit went on to further explain the legal effect of a consent decree as follows:

> A consent decree, although founded on the agreement of the parties is a judgment. [Citations omitted]. It has the force of res judicata, protecting the parties from future litigation. It thus has greater finality than a compact. As a judgment, it may be enforced by judicial sanctions, including citation for contempt if it is violated.

U.S. v. City of Miami, 664 F.2d at 439-40.

Finally, in regard to Rule 41 and its requirements, the Fifth Circuit in *U.S. v. Transocean Air Lines, Inc.*, 356 F.2d 702, 705 (5th Cir. 1966), distinctly and clearly states, "[t]he Rule requires that for a dismissal by stipulation to be effective, the stipulation must be filed."

CONCLUSION

The facts and law as applied to Petitioner fairly demonstrate that the district court acted in excess of legal authority or jurisdiction. It is respectfully requested that this Court order the district court and accordingly the Eighth Circuit to vacate their orders of October 7, 1988, February 17, 1989, and January 31, 1990, respectively, and place Petitioner's case back on the trial docket pursuant to this Court's supervisory authority.

In the alternative, there exists a compelling need for direction from this Court to review and unify the circuit courts' application of the "inherent powers" doctrine or nullify it as it relates to court involvement in private settlement agreements. Rule 41(a) is a central focal point to issues involving private settlements and the subsequent removal of the case from the district court trial docket. Delimitation, or interpretation of Rule 41 as it relates to Petitioner's facts, would, without question, dictate to judges, litigants and their attorneys, what type of documents, stipulations or other conditions are required before a private suit can be settled in the federal system and removed from the trial docket. The aforedescribed excess of judicial authority can only serve to reduce confidence and predictability in the federal court system, and to those who have entrusted their careers and livelihood to the courts, such excesses can be devastating. Courts were conceived to faithfully serve parties in resolution of their disputes. This Court should seize every opportunity to remedy excesses of judicial authority and this Court is the last resort to accountability in the federal system. As opposed to allegedly promoting a clearing of trial dockets and therefore appellate dockets by the application of the

inherent powers doctrine as it relates to settlements, it is respectfully submitted that such an undefinable doctrine and the loose application of Rule 41, only countermand the very problem they were designed to remedy.

It is further respectfully submitted that clarification of the issues raised by this Writ would serve to significantly define district court jurisdiction over private settlements and the settlement process and consequently define to what extent private settlement agreements, including terms of dismissal, are solely matters of contract between the parties. Moreover, by requiring strict application of Rule 41(a) by settled parties, time consuming federal district court evidentiary hearings on issues such as authority of a party's attorney to settle, terms of oral settlement agreements, and retention of jurisdiction over settlements, would be nonexistent. Petitioner, therefore, respectfully prays this Court grant this Writ of Certiorari.

Respectfully submitted,

MARK W. BUBAK
11605 Arbor Street
Omaha, Nebraska 68144
402-330-7900
Counsel of Record and
Counsel for Petitioner
Dr. Alan J. Stalheim

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

- - - - - - - - - - - x

ALAN J. STALHEIM, M.D.

Plaintiff,

-vs-

CV 3-86-573

ALBERT LEA REGIONAL
MEDICAL GROUP, et al.,

Defendants.

- - - - - - - - - - - - - -x

Motions in the above entitled matter came on before the Honorable Janice M. Symchych, one of the Magistrates of the above Court, at St. Paul, Minnesota, on October 3, 1988, commencing at 11:00 a.m.

APPEARANCES:
PATRICK T. TIERNEY, ESQ
Appearing on behalf of Plaintiff.

JAMES LEHMAN, ESQ
DONNA D. GECK, ESQ.
Appearing on behalf of Defendants.

(p. 1) UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

- - - - - - - - - - - - x

ALAN J. STALHEIM, M.D.

Plaintiff,

-vs-

CV 3-86-573

ALBERT LEA REGIONAL MEDICAL GROUP, et al.,

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APPEARANCES:
PATRICK T. TIERNEY, ESQ
Appearing on behalf of Plaintiff.

JAMES LEHMAN, ESQ
DONNA D. GECK, ESQ.
Appearing on behalf of Defendants.

(p. 2) WHEREUPON, the following proceedings were had:

THE COURT: Okay. We have the matter as a follow up to our August 22 settlement conference at which a firm offer was made by the defendants to Dr. Stalheim as a settlement tender of the matter, and I have received some communication from the parties that the case had been settled, and observed that there are no settlement documents tendered to the Court as of this time, and trial is pending.

Mr. Tierney, what can you tell us about the status of the matter?

MR. TIERNEY: Your Honor, this matter was settled on the terms and conditions that were presented by the defendants to the Court.

THE COURT: At the settlement conference?

MR. TIERNEY: At the settlement conference. There were some negotiations following that settlement in the hopes of increasing the amount, the dollar amount that was to be paid in addition to the other terms and conditions that were discussed.

This settlement was – we received authority from Dr. Stalheim on the morning following the settlement conference –

THE COURT: That would be August 23?

MR. TIERNEY: On August 23 Dr. Stalheim came to our office and met with Ted Collins and myself. We explained the (p. 3) settlement, we recommended the settlement to him, and he gave us authority to proceed to settle the case, but to attempt to have the dollar amount of the settlement increased somewhat.

We conveyed that offer to the defendants later in the week. We received a response from the defendants that said either accept the offer or well, it will be withdrawn, on Monday it would be withdrawn, by Monday August 29.

On that Friday afternoon, August 26, I contacted the defense lawyers and advised them that the matter had in fact settled, we accepted the terms that were expressed in

my letter to them of August 25, which would be the terms that were presented to the Court on August 22.

My client and I so advised the Court at that time, that the matter had been resolved. It was just a matter of retaining jurisdiction until the documents could be completed.

After that Dr. Stalheim contacted me and advised me that he did not feel the settlement was in his best interest, that he would like to reinstate his original settlement demand of $150,000 together with some other terms, and ask that if this Court – if I could not accomplish a settlement of $150,000 that I should instruct – and some other additional terms, including a statement by our firm that the settlement was in his best interests, that I should ask the Court for six months to allow him to obtain other counsel that might proceed (p. 4) with this case.

I did convey that offer to Jim Lehman who rejected it. I never did discuss it further with Donna Geck, the attorney for Albert Lea. He would also like discovery reopened.

THE COURT: Ms. Geck, what is your position as to what the proper posture of the case is now? Is it your view that it was settled and there should be a settlement?

MS. GECK: It is, Your Honor. I think the statute language is clear in MSA 481.08, that an attorney has authority to bind his client to a settlement. In this case there is no dispute that Mr. Tierney had authority to bind his client to this settlement. Moreover, I think if you take a look at the Minnesota case law it is clear that a contract

was formed here and it is as final and conclusive and as binding as if judgment had been entered in the case.

The case law is also clear that the courts favor settlement out of court and they will not be readily set aside by courts, particularly when in this case there is no dispute that the authority was there, the case was settled. Merely what it was was second thoughts on the part of Dr. Stalheim.

I do have cites to some specific cases if the Court would like those at this time.

THE COURT: No, thank you. Hold on Dr. Stalheim, we will give you an opportunity once we hear what everybody's (p. 5) position is. Mr. Lehman?

MR. LEHMAN: Your Honor, my position is the same as Ms. Geck's. There was a contract entered into, a settlement was negotiated. Mr. Tierney even in his recitation of what occurred makes it clear that a contract was formed and we feel that the settlement is completed and it is just a matter of passing the paperwork around. I believe the checks have already been forwarded if I remember correctly, so we take the same position as Ms. Geck.

THE COURT: Okay. Now, Dr. Stalheim, you understand that you have counsel here to represent you, you don't have to say anything, but if you do want to say something on the issue of whether this case has been settled and whether the settlement should be enforced, you are free to do so at this time.

DR. STALHEIM: Well, if you remember my last statement –

THE COURT: Why don't you stand up in the courtroom, please.

DR. STALHEIM: If you remember my last statement to you in the settlement conference is I wanted to see how this looked in writing. I did not see this in writing and assumed it would be in my best interest and I found the document not in my best interest, in fact outright dangerous, and I did not see those until the – the first set until the 15th of (p. 6) September and I find that very difficult to deal with as a lay person and –

THE COURT: Is there some term of the settlement that you feel was changed on you in the written document?

DR. STALHEIM: Would you like to see them?

THE COURT: I would like you to answer the question I asked you, if you would.

DR. STALHEIM: Well, first, the document forced me to admit that my charges were without foundation and there was no release from one major party and if I would have signed those documents I would have been extremely vulnerable to a lawsuit from the others, from the defendants. There would be no connection since I indicated there was no foundation, by signing these documents, to my original complaints. I was not advised of this by my counsel in any form or fashion, nor had I read the documents before he forwarded them to me.

On that basis I feel my best interests are not being followed in this case and I have an affidavit here prepared to enter into the court. I am a lay person, I have no way of knowing what all these things mean, and I need

counsel to protect me, to make sure they are in my best interest, and I have not received that.

THE COURT: I guess I would like you to tell me whether there is any other term of the settlement as you understand it as was agreed to between yourself and the (p. 7) defendants, that is different in the written settlement document than what has been set forth there?

DR. STALHEIM: You mean language?

THE COURT: Whether there is any term or element of the settlement that you agreed to –

DR. STALHEIM: I agreed to settle once I saw the documents and I told you that in court, and I had not seen the documents. I assumed I would be seeing them very soon after the conference or at the same time, or the next day, and did not see them until the 15th, on the evening of the 15th.

THE COURT: Mr. Tierney, why don't you recite for me what the terms of the settlement are as you discussed them with your client?

MR. TIERNEY: Maybe I can read from my letter of August 25 which is the terms and conditions of the settlement that we proposed to defendants to settle the case after the settlement conference. There would be a total payment of $30,000 instead of the $40,000 that is in my letter. On behalf of defendant there would be a mutual release of any and all claims arising out of Dr. Stalheim's relationship with the defendants up through the date of the settlement agreement; all inquiries concerning Dr. Stalheim's employment with Albert Lea or his privileges with Naeve Hospital would be responded to in writing

by one person designated by Naeve Hospital or by Albert Lea.

(p. 8) The content of the written response would include and be limited to a statement of the dates of Stalheim's employment or privileges; that Dr. Stalheim's privileges were never removed nor were they ever the subject of any adverse action; and Dr. Stalheim voluntarily resigned in good standing; and further there would be documentation establishing that the Board of Directors of the defendant had approved the settlement and that the terms and conditions of the settlement itself would remain confidential.

THE COURT: Did you go over each of those terms of the settlement with your client prior to tendering that agreement to the defendants?

MR. TIERNEY: Yes, Your, at length. We spent the entire afternoon before the Court discussing those terms and conditions. If you recall the settlement –

THE COURT: I mean after.

MR. TIERNEY: And the following morning we spent an hour maybe an hour and a half or two hours discussing the settlement with Dr. Stalheim and Ted Collins and Myself were both there discussing that with him the day after the settlement in our office.

THE COURT: Dr. Stalheim, do you agree that you agreed to each of those terms that was recited by Mr. Tierney?

DR. STALHEIM: That was based on my preconceived understanding that I would see the document

before I would (p. 9) agree to settle and I assumed once I would see them they would be perfectly clear –

THE COURT: Aside from this –

DR. STALHEIM: I know that –

THE COURT: Just because we need to take it in pieces, did you agree to each of those terms as they were just recited by Mr. Tierney in court here?

DR. STALHEIM: Based on my attorney's advice at that time which I felt at that time was in my best interests, yes.

THE COURT: So you did agree to each of those terms?

DR. STALHEIM: But subsequently I have discovered that his advice has not been in my best interests, so therefore the whole concept of what is going on here I feel is not in my best interests; to the best I can tell with present counsel.

THE COURT. I do find that those are the terms that were set forth also during the settlement conference and that there was an oral agreement by the client to accept those terms, and that agreement was duly conveyed to the defendants who accepted it and there was an oral contract entered into and an oral contract to settle a lawsuit may be binding and in this case should be binding, and the settlement will be enforced according to the oral contractual terms and I will leave it to all of you parties if you want to formalize it by way of writing, but the settlement as it will be enforced is (p. 10) according to the terms outlined by Mr. Tierney here in Court.

Is there anything else that anybody needs to say at this point?

MR. TIERNEY: I would just like the record to reflect that I have advised Dr. Stalheim that if he feels I or my law firm or myself have done anything unethical, or anything that might constitute malpractice, he is certainly free to hire another lawyer to review the file and to pursue whatever claims he might have in that regard.

THE COURT: Anything else?

MS. GECK: The only thing I would add is subsequent to the time that the drafts were forwarded together with the releases there was some correspondence back and forth between plaintiffs counsel and us regarding the language of the release and I think based on you correspondence to me that we will be able to work out some minor details of whether or not it is a Parringer release or that type of thing. I don't think we will have any problems along those lines. The terms do not affect the major points that were just covered by the Court.

THE COURT: Anything else?

MR. LEHMAN: My only question is if Dr. Stalheim should at this point not agree to sign the documents I would like to know if we should come back in for an order of the Court or will this proceeding take care of that? How do you (p. 11) want to handle that?

THE COURT: You have a transcript of what went forward here today, if you want to order it.

MR. LEHMAN: Very fine, thank you.

THE COURT: Dr. Stalheim?

DR. STALHEIM: You mean there is no protection of my rights in this case than depending on this piece of paper that I had not seen yet and had no idea of what was going to be on it?

THE COURT: I just found there was an oral agreement to settle the lawsuit, agreed to by all of the parties, and that means that the lawsuit is terminated according to that oral agreement, and if you want to discuss it further or need some further explanation of that you can certainly talk to Mr. Tierney or any other lawyer that you wish to.

Okay. Anything else?

WHEREUPON, the proceedings came to a close.

CERTIFIED /s/ L. P. Lindberg
L. P. LINDBERG
Official Court
Reporter.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ALAN J. STALHEIM, M.D.,

Plaintiff,

v.

ALBERT LEA MEDICAL SURGICAL CENTER, LTD.; ALBERT LEA REGIONAL MEDICAL GROUP, P.A.; LOWELL WHERRY BARR, M.D.; ARLO ROSLYN BLUMER, M.D.; JAMES FOY BURNS, M.D.; DENNIS E. COLBY, D.O.; TERRY LEE MARTINSON, M.D.; RICHARD SHEPARD, M.D.; THOMAS ANDREW TREANOR, M.D.; C.C. LOWERY; DAVID L. VAN FOSSEN; NAEVE HOSPITAL; LARRY W. PFAFF; L.E. SHELHAMER, M.D.; DANIEL J. McCORMICK; NAEVE HEALTH CARE ASSOCIATION; JOHN DOE; MARY ROE; and XYZ CORPORATION,

Defendants.

3-86 CIV 573

ORDER OF DISMISSAL

The court having been advised by counsel that the above action has been settled,

IT IS ORDERED That this action is hereby dismissed, with prejudice, the court reserving jurisdiction for sixty (60) days to permit any party to move to reopen the action, for good cause shown, or to submit and file a stipulated form of final judgment.

DATED: October 7th, 1988.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ALAN J. STALHEIM, M.D.,

Plaintiff,

v.

ALBERT LEA MEDICAL SURGICAL CENTER, LTD., et al.

Defendants.

3-86 CIV 573

ORDER

FILED
FEB 17 1989

The above entitled action is before the court on plaintiff's motion to reopen. The plaintiff contends that he never gave his attorney authority to settle the case, that the authority his attorney had to settle the case, if given at all, was contingent upon plaintiff's review and approval of the actual written settlement language, and that the settlement agreed to by his attorney was unacceptable and it should not be binding. Counsel for the defendants argues that under the facts of this case and pursuant to Minnesota statute, as well as supporting case law, plaintiff's attorney had the authority and did, in fact, bind his client and the settlement agreement must stand. *See* Minn. Stat. § 481.08. Pursuant to Fed. R. Civ. P. 78, there is no need for oral argument.

I. FINDINGS.

1. On August 22, 1988, a settlement/pretrial conference was held before Magistrate Janice M. Symchych. All parties, their counsel and claims representatives were present.

2. On August 23, 1988, plaintiff gave his attorney authority to settle the action on certain terms and condition.

3. On August 25, 1988, plaintiff's counsel, Patrick Tierney, sent a letter to the defendants outlining the terms of that settlement, including a cash payment of $40,000.00.

4. Defendants responded and agreed to all terms except that the total dollar amount would be $30,000.00

5. On August 26, 1988, plaintiff's counsel contacted defense counsel and advised that the case was settled on the terms offered by the defendants. On the same date, plaintiff's counsel contacted the court and advised that the case was settled. The court retained jurisdiction until all closing documents could be completed.

6. On September 13, 1988, counsel for defendants forwarded the settlement drafts and releases.

7. On October 3, 1988, Magistrate Symchych held a confirmation hearing of the settlement.

8. During that hearing, on the record, the plaintiff confirmed the terms of the settlement.[1]

9. On October 7, 1988, the court dismissed the above captioned matter.

10. After retaining new counsel, plaintiff now seeks to reopen.

II. DISCUSSION.

Minnesota law is clear that an attorney may, with agreement, bind his or her client at any stage of the litigation or action. *See* Minn. Stat. § 481.08. There is no requirement that the settlement made by an attorney be in writing if the attorney has the approval of his client. *Ghostley v. Hetland*, 295 Minn. 376, 378, 204 N.W.2d 821, 823 (1973); *Johnson v. Sitzmann*, 413 N.W.2d 541, 544 (Minn. Ct. App. 1987). Such authority to settle can be express or implied. *Skalbeck v. Agristor Leasing*, 384 N.W.2d 209, 213 (Minn. Ct. App. 1986). *See also, Austin Farm Center v. Austin Grain Co.*, 418 N.W.2d 181, 184 (Minn. Ct. App. 1988).

The instant case involves a plaintiff who personally confirmed the settlement in open court and on the record. The undersigned has carefully read the transcript on file

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[1] The court: "[D]id you agree to each of those terms as they were just recited by Mr. Tierney in court here?"

Dr. Stalheim: "Based on my attorney's advice at that time which I felt at that time was in my best interests, yes."

Transcript of October 3, 1988, hearing before Magistrate Janice M. Symchych at 9.

as well as the written submissions of counsel. There can be no question that the plaintiff gave to his counsel, Patrick Tierney, express authority to settle, and that such settlement terms were acceptable to the plaintiff when the plaintiff agreed to them. The plaintiff set forth an offer on August 25, 1988. Defendants counteroffered. The plaintiff, through his counsel, accepted defendants' counteroffer on August 26, 1988. Only after a settlement was reached did the plaintiff balk and claim that he never gave his attorney the necessary authorization and that it was unacceptable. This is simply too late.

There was an offer and acceptance and there was a meeting of the minds. The settlement is binding on the plaintiff. *Skalbeck*, 384 N.W.2d at 214 (The record supports finding that there was authority to settle.). *See, e.g., Eggleston v. Keller Drug Co.*, 265 Minn. 78, 120 N.W.2d 305 (1963). (Settlement agreements are presumed valid and if there is a reasonable basis in the record the settlement will be binding.) Plaintiff has failed to meet his burden of proving that the authorization was not given. *See Greater Kansas City Laborers Pension Fund v. Paramount Indus.*. [sic] 829 F.2d 644, 646 (8th Cir. 1987).

Based on the file as presently constituted, the submissions by counsel, and the above discussion,

IT IS ORDERED That:

1. Plaintiff's motion to reopen be, and the same hereby is, DENIED.

2. The settlement check shall be deposited with the Clerk of Court, United States District Court for the District of Minnesota, St. Paul, Minnesota, for distribution in

accordance with the fee retainer agreement executed between Dr. Alan Stalheim and the law firm of Collins, Buckley, Sauntry & Haugh, upon proper petition by the Collins firm and further order of the court.

3. The hearing scheduled for February 27, 1989, is cancelled.

DATED: February 17, 1989.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
760 FEDERAL COURTS BUILDING
ST. PAUL, MINNESOTA 55101

May 3, 1989

Mr. Patrick T. Tierney
Collins, Buckley, Sauntry & Haugh
West 1100 First National Bank Bldg.
332 Minnesota Street
St. Paul, MN 55101-1379

Mr. John C. Hottinger
Hottinger Law Offices
108 East Hickory Street, Suite 200
P.O. Box 3183
Mankato, MN 56002-3183

Re: Dr. Alan Stalheim v. Albert Lea Medical Surgical Center 3-86 CIV 573

Dear Counsel:

On February 17, 1989, I issued an order denying the plaintiff's motion to reopen the settlement and directing that the settlement checks be deposited with the Clerk of Court for distribution in accordance with the fee retainer agreement executed between Dr. Alan Stalheim and the law firm of Collins, Buckley, Sauntry & Haugh upon proper petition by the Collins firm and further order of the court.

On March 15, 1989, the plaintiff appealed to the Eighth Circuit Court of Appeals from that order.

The appropriate settlement checks have now been deposited with the Clerk of our Court, totalling $30,000. By reason of the appeal, I have temporarily lost jurisdiction in the case.

It occurs to me that it might be well for the two of you to get together and prepare a stipulation and proposed order providing for the deposit of the settlement amount in an appropriate interest bearing account pending the decision from the United States Court of Appeals for the Eighth Circuit. Please let me have your reactions to that suggestion.

Yours very truly,

/s/ Donald D. Alsop
Donald D. Alsop

cc: Douglas Hefti, Financial Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
3-86-CIV-573

Alan J. Stalheim, M.D., Plaintiff, v. Albert Lea Medical Surgical Center Ltd.; Albert Lea Regional Medical Group, P.A.; Lowell Wherry Barr, M.D.; Arlo Roslyn Blumer, M.D.; James Foy Burns, M.D.; Dennis E. Colby, D.O.; Terry Lee Martinson, M.D.; Richard Shepard, M.D.; Thomas Andrew Treanor, M.D.; C.C. Lowery; David L. Van Fossen; Naeve Hospital; Larry W. Pfaff; L.E. Shelhamer, M.D.; Daniel J. McCormick; Naeve Health Care Association; John Doe; Mary Roe; and XYZ Corporation, Defendants.	)	AFFIDAVIT OF ALAN J. STALHEIM, M.D.
STATE OF SOUTH DAKOTA COUNTY OF BEADLE	))ss)	

ALAN J. STALHEIM, M.D., being first duly sworn deposes and says that:

1. Early in this lawsuit, I informed my attorney Patrick Tierney that I either wanted this lawsuit to result in my recovery of enough money so that I could retire from the practice of medicine or, alternatively, that I

wanted this matter concluded in a manner which would protect and assure my future medical career in which case the financial recovery was of secondary importance.

2. On June 27, 1984, the Board of Directors of Albert Lea Medical and Surgical Center Ltd. directed me to seek an impaired physician evaluation through the Minnesota Medical Association Impaired Physician Program. The impaired physician evaluation began on July 11, 1984 at the Mayo Clinic and forms part of the basis for this lawsuit. An impaired physician evaluation usually indicates that the physician is abusing alcohol or drugs. I felt that the only way to protect myself from the damage of having undergone an impaired physician evaluation was to have a letter of exoneration signed by the Defendants. On May 20, 1988, New Mexico denied me a medical license which I felt was due to the fact that I had undergone an impaired physician evaluation. On March 21, 1988 I had written to Tierney and indicated that I wanted a letter of exoneration as part of any settlement. I also requested copies of the Defendants' depositions, all transcribed court proceedings, the court reporter's tapes of the first portion of my deposition and all inter-office memos regarding my case. Early in 1988, Tierney prepared a sample letter of exoneration.

3. The specific language of any possible future settlement agreement was very important to me. I wanted to be assured that the language of the settlement agreement would protect my future medical career by resolving the issues of my referral to an impaired physician evaluation and the Mayo Clinic records regarding that referral. During all of my conversations with Tierney and his partner Theodore Collins, I relayed to them that my main concern

was my future career in medicine and the affect of having undergone an impaired physician evaluation. I felt that it was very important that the settlement documentation adequately protect my career. I felt that if the settlement agreement was not appropriately drafted, I would be subject to lawsuits and possibly would be unable to pursue my medical career. The records at the Mayo Clinic indicated that I was a paranoid schizophrenic. Dr. R. M. Morse, who also evaluated me as a part of the impaired physician evaluation at the Mayo Clinic, determined that the finding that I was a paranoid schizophrenic was invalid. I felt that the records at the Mayo Clinic needed to be clarified. I feared that if the records that stated that I was a paranoid schizophrenic ever became public, I would be vulnerable to medical malpractice suits by patients. I also feared that criminal charges might be able to be brought against me based upon the information contained in the Mayo Clinic records. I was also concerned about possible countersuits by the Defendants. I relayed these concerns to my attorneys at the beginning of this lawsuit and on many occasions throughout the litigation.

4. In the early spring to 1988, Patrick Tierney was demanding a settlement which would include $200,000 a letter of exoneration, and an appropriately drafted settlement agreement which would protect my future medical career. Obtaining a letter of exoneration and a settlement agreement which would protect my future career were extremely important to me.

5. On August 16, 1988, Tierney demanded a settlement which would include $150,000, a letter of exoneration, and an appropriately drafted settlement agreement. Prior to the August 22, 1988 settlement conference,

Tierney told me during a telephone conversation that he had been approached by the hospital which wanted to settle separately. Tierney had refused the hospital's offer. I was not consulted.

6. Prior to the August 22 settlement conference, I was still demanding $150,000, a letter of exoneration, and an appropriately drafted settlement agreement. I had not agreed to settle upon any other terms.

7. On the day of the settlement conference, August 22, 1988, I met with Collins. He told me that I had to settle for $30,000 because I would lose in court and because Magistrate Symchych would recommend a settlement in the range of $30,000 based upon her reading of the Defendants' depositions. My response was that I would have to see how the settlement conference went. Tierney arrived shortly before the settlement conference began. I did not agree with attorneys Collins and Tierney to settle for $30,000 or any other figure at that time. I was still expecting a letter of exoneration and an appropriately drafted settlement agreement which would protect my future medical career to be included in any settlement.

8. During the August 22, 1988 settlement conference, Magistrate Symchych initially listened to presentations made by Tierney and by Donna Geck, who appeared on behalf of the Defendants. Magistrate Symchych then met alone with myself, Collins and Tierney. She recommended a settlement of $35,000. Collins informed Magistrate Symchych that I would require a letter of exoneration and a settlement agreement which would protect my future medical career. Collins told Magistrate

Symchych that the amount of money which I would receive was of secondary importance and that my main concern was obtaining a settlement document which would protect my future career.

9. Magistrate Symchych next met with the Defendants. I waited in the hall with Collins and Tierney. There was no additional discussion between myself and my attorneys regarding reaching settlement.

10. After Magistrate Symchych spoke to the Defendants, she called me and my attorneys back into her chambers. Magistrate Symchych indicated that the Defendants were reluctant to sign a letter of exoneration because they feared potential liability problems because of findings of the Mayo Clinic. She stated that it was Dr. Shepard who was urging the Defendants to refuse to sign a letter of exoneration. She indicated that the Defendants would agree to $30,000 in addition to the signing of a settlement agreement. I indicated to Magistrate Symchych that $30,000 wouldn't even cover my expenses. She suggested that I hold out for $45,000. I made no statements to Magistrate Symchych or to my attorneys that I would accept any possible settlement.

11. Magistrate Symchych again spoke to the Defendants. While she was speaking to the Defendants, I spoke to Tierney and Collins in the hall. At this point, I was still insisting upon the letter of exoneration. I listened to my attorneys discuss drafting the settlement agreement. However, I had not agreed to settle this matter and did not indicate to them at that time that I would settle.

12. Tierney and I were then called back to speak to Magistrate Symchych. Collins had decided to leave. Magistrate Symchych indicated that the Defendants would absolutely not agree to a letter of exoneration but would agree to settle for $30,000. She also stated that they would not offer any more than $30,000.

13. I told Magistrate Symchych that I would consider settling *provided that* I reviewed the settlement agreement and was satisfied that its language would protect my interest. I believe that my exact words to Magistrate Symchych were that I needed " . . . to see how this looks in writing . . . " before agreeing to conclude the matter. Magistrate Symchych indicated that if there was anything she could do to assist in settling to let her know.

14. After the settlement conference, Tierney told me to call his office the next morning. I attempted to call Tierney but could not reach him. Finally, I went to his office at 11:00 a.m. Collins attended my meeting with Tierney and told me that I would have to settle because I would lose in court. I felt that Collins was trying to intimidate me into settling. I expressed to Collins that I felt that the denial of a New Mexico medical license was a direct damage from the Defendant's actions which I should be compensated for. He told me that was another matter which would have to be addressed separately from this action. I understood that the settlement agreement would be drafted for me to review during this meeting; however, it had not been completed.

15. I did not agree to a settlement at my meeting with my attorneys during the morning of August 23,

1988, since I had not yet reviewed or approved the language of the settlement agreement.

16. Tierney suggested that I return to his office at 1:30 p.m. on August 23, and suggested that the settlement agreement would be available for my review at that time.

17. Over the noon hour on August 23, when my attorneys were not present, I became concerned that I obtained a mutual release from all of the Defendants. I also was concerned that the settlement agreement and release be signed and approved by all of the board members of the Defendants. I felt that if the document was not signed by the board members it would be invalid. My attorneys had never indicated otherwise.

18. When I returned to meet with Collins and Tierney at 1:30 p.m. on August 23, 1988, I pointed out my concerns about obtaining mutual releases from the Defendants and obtaining a settlement agreement that was approved and signed by all of the board members of the Defendants. I repeated to Collins and Tierney that my main concern was how the settlement agreement would affect my future medical career. I asked Tierney and Collins to provide me with a written explanation of what settling would mean. Tierney nodded his head in response. I was concerned that an inappropriate settlement would adversely affect my future career. If I was going to settle, I wanted to assure that my career would be protected and that I would not have to undertake subsequent litigation to protect my career. I have never received the written explanation of settlement which I requested. I also requested that the Mayo Clinic records be sealed. I

also expressed concern that the Albert Lea Medical Surgical Center, Ltd., a named Defendant, was no longer in existence but had been merged into the Albert Lea Regional Medical Center. My attorneys never explained the significance and effect of the merger.

19. Collins and Tierney did not have a settlement agreement drafted at the 1:30 p.m. August 23, meeting for me to review. In my March 21, 1988 letter to Tierney I had insisted that I review the depositions of the Defendants and the court documents releasing Defendants Tuveson, the Mayo Clinic, the Minnesota Medical Association and documents relating to Psychiatrist Pilling prior to agreeing to settle. During the afternoon conference on August 23, I repeated that I would need to review those documents. I believe that my exact word were "You will send me down the settlement documents, the court decision documents, and the Pilling order." Tierney responded by nodding his head. I felt that I could not adequately evaluate whether I should settle without reviewing those documents.

20. Additionally, at the 1:30 p.m. meeting on August 23, I suggested that I should be receiving more than $30,000 in addition to an appropriately drafted settlement agreement. Tierney suggested that we would try for a higher settlement amount. I also discussed with Tierney the fact that he had not taken depositions of any of the individuals at the Mayo Clinic. He indicated that they were next on the list to be deposed. Tierney said that he would send a letter to the attorney for the Mayo Clinic to get the Mayo Clinic records sealed.

21. On August 25, Tierney wrote to the attorneys for the Defendants offering to settle. This letter was sent without my authority. I had not yet reviewed the documents including the settlement agreement. The provisions of the letter provided for settlement which would include the following:

a. $40,000;

b. a mutual release from all Defendants;

c. a provision requiring all inquiries regarding my employment with Albert Lea to be responded to in writing by one individual. Any questions concerning my employment with Naeve would be responded to in writing by one individual designated by Naeve;

d. the contends of any written response would be limited to the dates of my employment or privileges, that my privileges were never removed nor were they ever subject of any adverse action, and what I resigned voluntarily in good standing;

e. documentation that the Board of Directors of each Defendant had approved the settlement; and

f. the settlement would remain confidential.

This letter failed to condition the settlement on my review and approval of the settlement agreement. My approval was an essential element of my agreement to settle and was communicated to Tierney on numerous occasions.

22. Collins and Tierney did not send me a copy of the settlement agreement or the Defendants' depositions and other documentation that I had requested prior to

August 26. On that date Tierney contacted the Defendants' attorneys and stated that this matter had been settled. I had clearly indicated to him that he was not to settle this matter before I reviewed and approved the settlement document and reviewed the Defendants' depositions and other requested documents.

23. On September 7, I sent a telegram to Tierney telling him not to settle. (See telegram attached as Exhibit "A") The same day I sent a letter to Tierney indicating that I was withdrawing my offer to settle. This letter was sent because I felt that Collins had tried to coerce me into settling and because I had not reviewed and approved the documentation. I again indicated that I would not agree to settle without reviewing the proposed settlement documents, the Defendants' depositions, all decisions releasing the Minnesota Medical Association, the Mayo Clinic, and attorney Tuveson, the judicial decision requiring me to see Dr. Pilling, the tapes of the first portion of my deposition, and a copy of a March 23, 1984 letter which I had given to Collins which was written by Larry Pfaff, the new administrator of Naeve Hospital. I also wanted any statements provided by the hospital in regard to my employment to indicate, among other items, that there was no suspicion of drug or alcohol abuse.

24. Subsequent to sending the telegram and letter on September 7, I called numerous attorneys to investigate whether I had a right to review and approve the settlement agreement and the Defendants' depositions and other documents. On September 9, I called Tierney and again told him to send the settlement agreement, the Defendant's depositions, and the other documents. At this time, since I had not agreed to settle this matter, I

assumed that the trial was still set for September 13. My attorneys had not indicated anything differently.

25. On September 11, I phoned Tierney at his home. I was frantic to find out whether the trial was still scheduled for September 13 because I had surgery scheduled. Tierney responded that a different trial would be held on the 13th. He stated that I would receive the defendants' depositions by the following Monday.

26. On September 15, I received the drafted of the settlement agreement. I had difficulty reading and understanding the settlement agreement. Tierney had indicated that I had to sign it and return it by the following Monday, September 19. I had surgery scheduled for the morning of September 16. In order to return the document on time, I would have to review it the evening of September 15. This was insufficient time for me to adequately review the document.

27. I spent the evening of September 15, trying to review the settlement agreement. Upon reviewing it, I realized that it did not contain mutual releases from all of the Defendants. There were not releases from Naeve Hospital and Naeve Health Care Association. I was also concerned because Albert Lea Medical Surgical Center, Ltd. is now Albert Lea Regional Medical Center, and I felt that this would invalidate the agreement. I also understood that I was releasing any claims that I might have against Tierney. I did not understand the settlement agreement, and my attorneys made no effort to explain its meaning to me. The settlement agreement was unacceptable to me because of the above-mentioned concerns and because I was not satisfied that the specific language of

the agreement adequately protected my future medical career by resolving the issue of my referral to an impaired physician evaluation.

28. On September 16, I spoke to Tierney regarding the inadequacy of the settlement agreement. We had a court date for September 19, to discuss this before Magistrate Symchych. I moved my surgery schedule to September 21, so that I could attend. When I arrived in St. Paul on September 19, I called the court and was informed that Tierney had requested that the hearing be moved to September 21.

29. On September 19, I met with Tierney and Collins at 9:30 a.m. I again expressed my concerns about my future medical career and the fact that the settlement agreement which was drafted did not adequately protect that concern. Tierney admitted that he had not read the settlement agreement. Collins indicated that he was sick and tired of this matter and just wanted to get it settled. Collins stated that they would withdraw from representing me if I did not agree to settle.

30. During the September 19 meeting, I expressed to Tierney and Collins my concern that I understood the settlement agreement to require me to admit that the claims which I brought did not have merit. The Defendants asserted in the settlement agreement that this was a doubtful and disputed claim. I assumed that by signing the document I was admitting that my claims were without merit. Tierney and Collins failed to explain these provisions of the settlement agreement to me. Tierney stated that he had not read the settlement agreement. I also expressed my dissatisfaction with the fact that the

Mayo Clinic records had not been dealt with and that depositions of individuals at the Mayo Clinic had not been taken.

31. On September 27, I received and reviewed a second settlement agreement. The second settlement agreement did contain a mutual release from Naeve Hospital and Naeve Health Care Association. However, I was not satisfied with the second settlement agreement because I felt that it did not adequately protect my future medical career. I felt that it did not resolve the issues of my referral to an impaired physician evaluation and the Mayo Clinic records regarding that evaluation. I also assumed that the second settlement agreement required me to admit that my claims were without merit. I also noticed that this document was a "Pierringer" release. My attorneys had never discussed with me that I would be signing a Pierringer release or explained its implications. I had no idea what a Pierringer release was and was resigned to looking in a Black's Law Dictionary to attempt to locate its definition. I refused to agree to sign the second settlement agreement. I did not understand the document and felt that it did not adequately protect my future career by not resolving the issue of my referral to an impaired physician evaluation.

32. I had not given Tierney authority to settle this matter prior to my review and acceptance of the settlement agreement. On September 22, I wrote to Tierney and outlined the course of action which I wanted him to follow at the November 3, 1988 hearing. I instructed him to return to a position demanding $150,000, a letter of exoneration, and an appropriately drafted settlement agreement. Alternatively, I requested that he request the

court for a six month period for me to secure new counsel. If neither of these two options were available, I requested that he try this lawsuit.

33. At the November 3, hearing before Magistrate Symchych, Tierney's position was that this matter was settled on the terms and conditions presented at the settlement conference. Tierney stated that I had given him authority to settle on the morning of August 23. I had not given Tierney authority to settle on August 23 or at any other time. I refused to give Tierney authority to settle until I had reviewed and accepted the settlement agreement.

34. Magistrate Symchych did allow me to speak at the November 3, 1988, hearing but refused to accept an affidavit which I had prepared. The affidavit outlined that I had not agreed to settle this matter. I had indicated to my attorneys that I would settle only upon my review and approval of the settlement agreement. I did not agree to any settlement at the November 3, 1988 hearing.

35. I never gave Tierney or Collins authority to settle this matter prior to my review of the settlement documents. The specific language of the settlement agreement was extremely important to me as it was very important that it protect my future medical career. The amount of money which I would receive as settlement was of secondary importance, unless it was sufficient to economically protect me from the losses incurred by the destruction of my medical career.

36. I never signed any settlement agreement, and the settlement checks have been returned to the Defendants.

37. Subsequent to the November 3 hearing, Collins and Tierney have refused to represent me.

Further this affiant sayeth not.

Subscribed and sworn to before
me this 6 day of January, 1989.

/s/ Illegible
Notary Public

/s/ Alan J. Stalheim, M.D.
Alan J. Stalheim, M.D.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5163
No. 89-5164

Alan J. Stalheim, M.D., Appellant, v. Albert Lea Regional Medical Group, P.A.; Lowell Wherry Barr, MD; Arlo Roslyn Blumer, MD; James Foy Burns, MD; Dennis E. Colby, D.O.; Terry Lee Martinson, MD; Richard Shephard, MD; Thomas Andrew Treanor, MD; C. C. Lowery; David L. Van Fossen; Naeve Hospital; Larry W. Pfaff; Daniel J. McCormick; Naeve Health Care Association; John Doe; Mary Roe; and XYZ Corporation, Appellees.	*	Appeal from the United States District Court for the District of Minnesota. [UNPUBLISHED]

Submitted: December 12, 1989
Filed: January 31, 1990

Before McMILLIAN, JOHN R. GIBSON and BOWMAN, Circuit Judges.

PER CURIAM.

Allen J. Stalheim, M.D., appeals from district court[1] orders: (1) denying his motion to reopen his case filed against two hospitals, an association, and individuals affiliated with those organizations; (2) ordering that a settlement check be deposited with the district court clerk for distribution to Dr. Stalheim and his original counsel; and (3) denying his motion for oral argument and reconsideration of his motion to reopen the case.

In his complaint, Dr. Stalheim asserted claims arising from the termination of his professional relationship with the appellees. On August 22, 1988, the parties participated in a settlement conference with United States Magistrate Janice Symchych. On August 25, Stalheim's counsel at the time, Patrick Tierney, submitted proposed settlement terms, including a demand for a cash payment of $40,000, to the appellees. The appellees agreed to all of the terms in the proposal except the demand for a payment of $40,000, they counter-offered to pay only $30,000.00. On August 26, Tierney contacted the appellees' attorneys and informed them that the counter-offer was accepted and that the case was settled.

Magistrate Symchych held a follow-up settlement conference on October 3. At that conference, Tierney was asked to outline the terms of the settlement. In response to a question from Magistrate Symchych, Tierney stated

[1] The Honorable Donald D. Alsop, Chief Judge, United States District Court for the District of Minnesota.

that he had explained the details of the proposed settlement to Dr. Stalheim before notifying the appellees' attorneys that a settlement had been reached. (Jt. App. at 8). Dr. Stalheim stated that he had agreed to the settlement terms based upon his attorney's advice at that time. However, he said that he had subsequently discovered that his lawyer's advice had not been in his best interest. (Jt. App. at 9). After Dr. Stalheim made his statements, Magistrate Symchych found that a valid oral contract existed between the parties which would be enforced according to the terms outlined by Tierney that day at the follow-up conference. (Jt. App. at 9-10). The district court entered an order of dismissal on October 7, 1988.

Dr. Stalheim then filed a motion to reopen the case under Federal Rule of Civil Procedure 60(b), which the district court considered pursuant to Rule 78 without oral argument. The court observed that Dr. Stalheim had "personally confirmed the settlement in open court and on the record" and concluded that:

> There can be no question that the plaintiff gave to his counsel, Patrick Tierney, express authority to settle, and that such settlement terms were acceptable to the plaintiff when the plaintiff agreed to them. . . . Only after a settlement was reached did the plaintiff balk and claim that he never gave his attorney the necessary authorization and that it was unacceptable. This is simply too late.

(Jt. App. at 69-70).

Dr. Stalheim filed a motion asking the district court to allow oral argument and to reconsider Stalheim's prior motion to reopen the case. The district court denied this

motion for oral argument and reconsideration on March 1, 1989.

On appeal, Dr. Stalheim argues that relief is proper under Rule 60(b) where an attorney's authority to enter a settlement is questioned. The issue before the magistrate and district court was a factual one: did Dr. Stalheim agree to a settlement? The district court's findings of fact may be set aside only if they are clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). After carefully considering the briefs in this case, the oral arguments, and the record of the proceedings before the magistrate and district court, we conclude that there is no error of law and that the findings of fact are not clearly erroneous. We therefore affirm the judgment of the district court. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Federal Rule of Civil Procedure 41, 28 U.S.C., Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) ***By Plaintiff; by Stipulation.*** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) ***By Order of Court.*** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for

dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the

proceedings in the action until the plaintiff has complied with the order.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 2, 1987, eff. Aug. 1, 1987.)

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> . . .

(As amended June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

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28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

(June 25, 1948, ch 646, § 1, 62 Stat. 929; Oct. 31, 1951, ch 655, § 48, 65 Stat. 726; July 7, 1958, P. L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, P. L. 97-164, Title I, Part A, § 124, 96 Stat. 36.)

MAILGRAM SERVICE CENTER
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4-002155S252002 09/08/88 ICS IPMBNGZ CSP SLFB
1 6053521482 MGM TDBN UG HURON SD 09-08 0726A EST

ALAN STALHEIM
1925 MCDONALD AVE
HURON SD 57350

THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

6053521482 FRB TDBN UG HURON SD 14 09-08 0726A EST
PMS ATTORNEYS T. COLLINS AND P. TIERNEY RPT DLY MGM, DLR
WEST 1100 FIRST NATL BANK BLDG
ST PAUL MN 55101
DEAR ATTORNEYS
DO NOT SETTLE WILL BE SENDING LETTER ARRIVING FRIDAY WITH FULL COMMENTS
ALAN STALHEIM
1925 MCDONALD AVE
HURON SD 57350

07:31 EST

MGMCOMP

Exhibit "A"

Supreme Court, U.S.
FILED
JUN 4
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1682

In The

Supreme Court of the United States

October Term, 1990

ALAN J. STALHEIM, M.D.,

Petitioner,

vs.

ALBERT LEA MEDICAL SURGICAL CENTER, LTD., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Whether the Federal District Court exceeded its legal authority in dismissing petitioner's cause of action with prejudice after counsel, acting with full authority of their respective clients, made a full, complete and final settlement of the cause of action.

LIST OF PARTIES

PETITIONER:

ALAN J. STALHEIM, M.D.

RESPONDENTS:

ALBERT LEA MEDICAL SURGICAL CENTER, LTD.; ALBERT LEA REGIONAL MEDICAL GROUP, P.A.; LOWELL WHERRY BARR, M.D.; ARLO ROSLYN BLUMER, M.D.; JAMES FOY BURNS, M.D.; DENNIS A. COLBY, D.O.; TERRY LEE MARTINSON, M.D.; RICHARD SHEPARD, M.D.; THOMAS ANDREW TREANOR, M.D.; C.C. LOWERY; DAVID L. VAN FOSSEN; NAEVE HOSPITAL; LARRY W. PFAFF; L.E. SHELHAMER, M.D.; DANIEL J. McCORMICK; NAEVE HEALTH CARE ASSOCIATION; JOHN DOE, MARY ROE; and XYZ CORPORATION.

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Rule 41(a)(1)(ii) FRCP..... 5

Rule 41(a)(2) FRCP 6

Rule 41(b) FRCP..... 6

Supreme Court Rule 17.1 2

STATEMENT OF THE CASE

Respondents Naeve Health Care Association, Naeve Hospital, Larry W. Pfaff and Daniel J. McCormick (hereinafter referred to collectively as the Naeve Respondents) concur in the factual matters contained in petitioner's statement of the case. The Naeve Respondents add the following additional statements of fact:

The October 3, 1988, proceeding before Magistrate Janice M. Symchych took place on the record. That proceeding was not a formal evidentiary hearing in that witnesses were not called, the Rules of Evidence did not strictly apply, and there was no sworn testimony. However, Magistrate Symchych gave petitioner an opportunity at that hearing to say whatever he wanted to say. Petitioner's attorney was also present at that hearing. Based upon the October 3, 1988, hearing, Magistrate Symchych found that the parties had reached a settlement. Judge Donald Alsop later heard Dr. Stalheim's arguments to reopen the case, but denied the request. Petitioner did not request a full evidentiary hearing before Judge Alsop. Petitioner did not request a formal evidentiary hearing until he appealed the decision of the District Court to the United States Court of Appeals for the Eighth Circuit.

At the October 3, 1988, hearing, petitioner clearly stated that shortly after the August 22, 1988 settlement conference, he agreed to the settlement to counsel for respondents but that he later changed his mind concerning the wisdom of the settlement. It was based on his subsequent reconsideration of the settlement terms that Dr. Stalheim hired new attorneys and argued that he had not given his former attorneys authority to settle.

The District Court dismissed petitioner's action with prejudice by order dated October 7, 1988. Petitioner moved to reopen which the District Court denied on February 17, 1989. On March 1, 1989, the District Court denied petitioner's motion for reconsideration of the February 17 order. Petitioner appealed to the Eighth Circuit Court of Appeals. The opinion affirming the judgment of the District Court appears in the appendix of petitioner at 36a-39a.

SUMMARY OF ARGUMENT

This Court should deny petitioner's request for a writ of certiorari. Petitioner has advanced no compelling reason to grant the writ pursuant to Supreme Court Rule 17.1. The District Court and the Court of Appeals for the Eighth Circuit have not rendered decisions in conflict with the decisions of other Federal Courts of Appeals on the same question; the District Court and the Court of Appeals for the Eighth Circuit have not decided an important question of Federal law which justice requires this Court to resolve; nor have the courts below so far departed from the accepted and usual course of judicial proceedings as to warrant exercise of this Court's supervisory powers. The District Court merely exercised a power which all District Courts incontrovertibly possess: the power to dismiss a cause of action with prejudice after it had been settled by attorneys acting with authority of their respective clients.

Additionally, this Court should deny petitioner's request for a writ of certiorari on the grounds that

petitioner has waived his right to seek the writ. Petitioner asserts that the courts below departed from the usual and accepted course of judicial practice by failing to grant him an evidentiary hearing to resolve the question of whether he had given his attorney authority to settle. However, petitioner did not request an evidentiary hearing before Magistrate Symchych or Judge Alsop of the District Court. The request for an evidentiary hearing first appears in petitioner's brief to the Court of Appeals for the Eighth Circuit. The Court of Appeals may not consider an argument which was not raised in the District Court. By failing to demand an evidentiary hearing, Plaintiff has waived any right to rely upon this asserted ground before this Court.

Petitioner also alleges that the courts below departed from the usual and accepted course of justice in failing to require strict compliance with the provisions of Rule 41 FRCP. Petitioner's reliance upon the provisions of Rule 41 FRCP appears for the first time in the instant petition to this Court. Petitioner did not assert the alleged violation of Rule 41 before the Magistrate, before the District Court, or before the Eighth Circuit. He has therefore waived any reliance on Rule 41.

Finally, this Court should deny the petition for a writ of certiorari on the grounds that, even if petitioner has not waived his demand for an evidentiary hearing or reliance upon Rule 41 FRCP, he has entirely failed to show that the courts below committed any error. He is not entitled to any greater hearing than the proceeding which took place before Magistrate Symchych. The Magistrate and the District Court properly found that he gave his former attorneys authority to settle the case and the

Eighth Circuit applied the proper legal standard in affirming the District Court decision. There has been no violation of Rule 41. Courts possess inherent power to dismiss settled cases with prejudice and remove such cases from the docket.

Petitioner cannot have suffered any prejudice from the lack of a formal evidentiary hearing at which he would have been permitted to call witnesses and elicit their sworn testimony. The Magistrate specifically asked petitioner at that hearing whether he had given his then attorneys authority to settle. Petitioner himself was the person with the most knowledge concerning that question. He admitted at the hearing before the Magistrate that he previously agreed to the terms of the settlement and gave his attorneys authority to settle the lawsuit. Although his testimony was not sworn, petitioner cannot complain that his own testimony was unsworn or that he had no opportunity to cross-examine himself.

REASONS FOR DENYING THE WRIT

I.

The District Court properly exercised its inherent power to dismiss a cause of action with prejudice following settlement thereof by attorneys acting with authority of the clients; in the present case, petitioner did not voluntarily dismiss his lawsuit by stipulation or otherwise; therefore, Rule 41(a) FRCP does not apply; in any event, petitioner has waived any right to rely upon an asserted violation of Rule 41 of failing to raise the issue below.

The Court should deny the petition for a writ of certiorari because petitioner has failed to show that the

courts below have departed from the usual and accepted course of justice or that they have ruled on a significant Federal question in a manner which conflicts with rulings of other Federal District Courts or Courts of Appeals. There is no occasion for this Court to develop, clarify or harmonize conflicting rulings of existing law. The District Court was well within its authority in dismissing petitioner's cause of action with prejudice following settlement thereof; the Eighth Circuit Court of Appeals applied the proper standard of review in affirming the District Court's judgment of dismissal.

Petitioner endeavors to make a showing of some sort of violation of Rule 41(a) FRCP. However, petitioner makes his Rule 41 argument for the first time in the instant petition. He did not bring the alleged violation of Rule 41 to the attention of the Magistrate, the District Court, or the Court of Appeals. Therefore, petitioner has waived the Rule 41 argument. This Court does not entertain arguments not considered by the lower courts. *Becker Steel Company v. Cummings*, 296 U.S. 74, 56 S.Ct. 15 (1935); *Hormel v. Helvering*, 312 U.S. 552, 61 S.Ct. 719 (1941); *Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399 (1976).

Even if petitioner has not waived his Rule 41 argument, it is clear that the Rule does not apply to the facts of this case. Rule 41(a), by its terms, applies only to voluntary dismissal of a cause of action by the plaintiff. Plaintiff may voluntarily dismiss an action by filing a notice of dismissal before an adverse party answers or files a motion for summary judgment, Rule 41(a)(1)(i) FRCP; by filling a stipulation of dismissal signed by all parties, Rule 41(a)(1)(ii) FRCP; or the court may order dismissal of an action at the plaintiff's instance "upon

such terms and conditions as the court deems proper". Rule 41(a)(2) FRCP.

All of the above are methods by which plaintiff may voluntarily dismiss an action. In the present case, plaintiff did not voluntarily dismiss his lawsuit. Instead, the court dismissed the action following settlement thereof on its own initiative, not at petitioner's instance. The court's action was either an exercise of an inherent power, *Bergstrom v. Sears Roebuck & Company*, 532 F.Supp. 923, 934 (D. Minn. 1982), or a dismissal under Rule 41(b) FRCP, the last sentence of which provides:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and *any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." (Emphasis added).

Rule 41 does not specifically provide for a dismissal following settlement; therefore, pursuant to the terms of the Rule, the dismissal operates as an adjudication on the merits. Regardless of the source of the court's power to dismiss a matter following settlement, it is apparent that Rule 41(a) has no application to facts of this case whatsoever.

The District Court "possesses inherent power to enforce settlement agreements in cases pending before it." *Bergstrom v. Sears Roebuck & Company*, 532 F.Supp. 923, 934 (D. Minn. 1982), citing *Aro Corporation v. Allied Witan Company*, 531 F.2d 1368 (6th Cir. 1976), cert. denied, 429 U.S. 862 (1976). "It is well settled that courts retain inherent power to enforce settlement agreements reached in

litigation pending before them." *Debose v. Mueller,* 552 F.Supp. 307, 308 (N.D. Ill. 1982). District courts also possess inherent power to find that a settlement has occurred. Courts may make such a finding in summary proceedings, such as occurred in the present case, where the assertion that a settlement has not occurred is "insubstantial". *Autera v. Robinson,* 419 F.2d 1197, 1200 (D.C. Cir. 1969).

It is an elementary principle of law that a settlement is binding upon the parties and may not be set aside merely because one of the parties has become dissatisfied or has changed his mind. "Once a settlement is reached, it cannot be repudiated by the parties." *Debose v. Mueller,* 552 F.Supp. at 307, n. 1. The Federal District Court in Louisiana has held that:

> "A settlement agreement will not be opened merely to inquire into the equities between the parties or because one of the parties has become dissatisfied with the agreement." *Thibaut v. Ourso,* 605 F.Supp. 1, 3 (M.D. La. 1981) app. dism. 705 F.2d 118 (5th Cir. 1983).

Under Minnesota law, an attorney has the authority to settle a case on behalf of a client. The statute provides:

> "An attorney may bind a client, at any stage of an action or proceeding, by agreement make in open court or in the presence of the court administrator and entered in the minutes by such administrator or made in writing and signed by such attorney." Minn. Stat. §481.08.

A settlement agreement is essentially a contract requiring an offer and acceptance on the essential terms of the agreement. *Ryan v. Ryan,* 292 Minn. 52, 193 N.W.2d 295 (1971). The settlement of a lawsuit is greatly favored

by the courts; a settlement will not lightly be set aside. *Beech v. Anderson*, 417 N.W.2d 709 (Minn. App. 1988). An attorney with the express or implicit authority of his client may settle a cause of action and bind the client to the settlement. *Skalbeck v. Agristor Leasing*, 384 N.W.2d 209 (Minn. App. 1986). The party seeking to set aside a settlement on the grounds that the party's attorney had no authority to settle has the burden of showing absence of authority. *Greater Kansas City Laborers Pension Fund v. Paramount Industries, Inc.*, 829 F.2d 644, 646 (8th Cir. 1987). The Eighth Circuit characterized this as "a heavy burden". *Greater Kansas City Laborers*, 829 F.2d at 646. Judge Dumbauld, concurring in the majority opinion, cautioned the District Court against wasting time in threshing "old straw", 829 F.2d at 647, in cases where a settling party seeks to avoid the settlement, although the judge noted that this would produce "ennui" rather than "unspeakable pain." 829 F.2d at 647, n. 3.

Petitioner appears to argue that the District Court improperly interfered in the parties' settlement and interjected an unwarranted condition upon that settlement by dismissing the matter with prejudice following the settlement. Although petitioner does not state what the court should have done, apparently he feels that the court should have allowed the parties to settle the matter and stipulate to dismiss it without prejudice. This scenario is nonsensical. A settlement is a full and final resolution of a lawsuit. There is no such thing as a dismissal without prejudice following settlement. In the first place, no defendant would pay money in settlement if plaintiff is free to sue him again. Secondly, compromise and settlement acts as a merger of, and precludes all right to recover on

an antecedent claim. 15 Am.Jur.2d, Compromise and Settlement, §24. In other words, a party cannot bring a second lawsuit on the same cause of action following settlement. The settlement is a full satisfaction of the claim and is a defense to any second lawsuit. *Dieudonne v. Arco Co.*, 139 Minn. 441, 166 N.W. 1067 (1918).

The claim that the court improperly interfered in the parties' settlement by dismissing the matter with prejudice is completely spurious. The settlement by operation of law fully and finally terminates the matter. Upon settlement, the court has the inherent power to dismiss the matter with prejudice, if for no other reason, to remove the case from its docket in the exercise of the court's power to maintain control over its calender and docket.

Petitioner's reliance upon *Gardiner v. A. H. Robins Co., Inc.*, 747 F.2d 1180 (8th Cir. 1984) is totally misplaced. *Gardiner* does not "stand for the proposition that the District Court [in the present case] acted in excess of its jurisdictional authority." (Petitioner at 11-12). In *Gardiner*, the parties entered into settlement agreements and stipulations of dismissal with prejudice. The court sua sponte entered a "So Ordered" notation on the settlement agreement, thereby transforming it from a private contract into a decree of the court. A violation of a court decree would be punishable with contempt proceedings, whereas the only remedy for a private contract is another lawsuit. Defendants objected to the District Court's notation on the settlement agreement. The Eighth Circuit agreed and reversed. *Gardiner*, 747 F.2d at 1183. The District Court improperly interfered in the parties' settlement by transforming it into a court decree. However, no one disputed

the propriety of entering a judgment of dismissal with prejudice following the settlement.

In the present case, the District Court did not interfere with the parties' settlement at all. The court simply found that a settlement had occurred and dismissed the matter with prejudice pursuant to the settlement. Unlike the District Court in *Gardiner*, the District Court here did not transform the parties' settlement agreement into a decree of court, punishable by contempt. The District Court merely removed a settled case from its docket.

Similarly, petitioner's reliance upon *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985) is misplaced. In *McCall-Bey*, the parties agreed to a settlement and stipulated to dismiss the matter with prejudice. Pursuant to the settlement, the District Court dismissed the action. One party failed to comply with the terms of the settlement agreement. The issue was whether the Federal District Court retained power under Rule 41 to enforce the settlement or whether the party seeking enforcement must proceed in a separate lawsuit in State Court. *McCall-Bey*, 777 F.2d at 1185.

McCall-Bey is completely irrelevant to the facts of the present case. In the present case, enforcement of the settlement is not an issue. The dispute is whether a settlement occurred. The District Court, properly exercising a valid power of the court, found that there was a settlement and dismissed the case.

II.

The District Court did no err in failing to give petitioner a full evidentiary hearing where petitioner made no request for such a hearing from the District Court; the Magistrate conducted a hearing at which petitioner had an opportunity to be heard; petitioner acknowledged at that hearing that he agreed to the terms of the settlement and gave his attorney full authority to settle, but that he later changed his mind.

Contrary to petitioner's assertion, he is not entitled to a full evidentiary hearing on the issue of whether he gave his former attorneys authority to settle the case. First, the request for an evidentiary hearing is not properly before this Court for the simple reason that petitioner never asked for such a hearing in the District Court. The request for an evidentiary hearing first appears in petitioner's brief to the Eight Circuit. An Appellate Court, whether the Eighth Circuit Court of Appeals or this Court, will not consider an issue not raised at the trial court level. Therefore, petitioner has waived any right he may have had to demand an evidentiary hearing.

Even if petitioner had not waived an evidentiary hearing, it is clear that he is not entitled to one. The Magistrate gave petitioner a hearing, although not a full evidentiary hearing. The Magistrate had the power to find summarily that there was a settlement agreement without a full evidentiary hearing based on the unequivocal facts of the case. Similarly, the District Court correctly found that the parties had entered into a settlement.

The courts have the inherent power to summarily enforce settlement agreements without an evidentiary hearing. *Aro Corporation v. Allied Witan Company*, 531 F.2d

1368 (6th Cir. 1976). Where there is a genuine dispute concerning the issue of whether an attorney had authority of a client to enter into a settlement, then an evidentiary hearing may be proper. *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 622 (6th Cir. 1973). In *Kukla*, the Sixth Circuit held that the District Court could not determine the issue of an attorney's authority based upon affidavits and unsworn statements of the attorney. *Kukla*, 483 F.2d at 622. However, in the present case, the Magistrate did not simply consider affidavits and unsworn statements of the attorneys. The Magistrate gave petitioner an opportunity to personally say whatever he wanted to say on the question. Although petitioner was not sworn at that time, he can scarcely complaint that his own testimony was unsworn or that he had no opportunity to cross-examine himself.

Petitioner represented to the court on October 3, 1988, that he once had agreed to the terms of the settlement as outlined by his former attorney. Further, the Magistrate found that the terms of the settlement were consistent with the discussions at the settlement conference on August 22, 1988, at which petitioner was present. Petitioner acknowledged that he agreed with the terms of the settlement shortly after the August 22 settlement conference, but that he changed his mind following that conference. The Magistrate and the District Court correctly found that there was a settlement and that petitioner gave his attorneys full authority to settle on the basis of the terms as outlined. There is no need for a full evidentiary hearing where petitioner has already been given a hearing to confirm the terms of the previous settlement conference and where he personally confirmed

that he agreed to the terms of the settlement. Additionally, the present request for an evidentiary hearing is improper where petitioner did not request such a hearing from the District Court.

The proper standard for an Appellate Court to apply to the District Court's judgment of dismissal is whether the findings are clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-574 (1985). If the findings are not clearly erroneous, then the Appellate Court should affirm the District Court's entry of judgment of dismissal. The Eighth Circuit Court of Appeals properly applied this standard of review and affirmed the District court.

CONCLUSION

In his petition for writ of certiorari, petitioner relies upon Rule 41 and his demand for an evidentiary hearing. However, he raised neither of these arguments before the District Court. Therefore, he will not be heard before this Court to raise such issues.

The sole issue before the District Court was whether petitioner agreed to the settlement and gave his attorneys authority to settle on the terms as outlined. The Magistrate found that he had in fact agreed and given authority. The District Court confirmed the Magistrate's finding and the Eighth Circuit Court of Appeals properly applied the not clearly erroneous standard of review and affirmed.

This Court does not sit as a fact finding body. The finding that petitioner agreed to the settlement and gave his attorneys authority is not clearly erroneous.

Petitioner has failed to raise an important question of Federal law, nor has he shown that the Eighth Circuit has issued a ruling in conflict with rulings of other courts of appeal. There simply is no basis for granting the writ.

For all the above reasons, this Court should deny the petition for a writ of certiorari.

DATED: May 30, 1990.

Respectfully submitted,

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